Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-494

OVERSEAS MOTORS, Inc., a Michigan corporation,

Petitioner,

–vs.–

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK AKTIENGESELLSCHAFT a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals appears at 519 F.2d 119. The opinion of the District Court appears at 375 F. Supp. 499.

Jurisdiction

The opinion and judgment of the Court of Appeals were entered June 2, 1975 (Appendix I, 5a, 6a). The instant petition was filed with this Court on September 30, 1975, more than 90 days thereafter. No extension of time for applying for a writ of certiorari was granted or even requested by Petitioner. Pursuant to 28 U.S.C. § 2101(c), this Court lacks jurisdiction of this matter.

Statute Involved

The statute governing the time for filing a petition for certiorari directed to a court of appeals in a civil action is 28 U.S.C. § 2101(c):

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Additional Questions Involved

1. Whether this Court has jurisdiction to entertain the instant petition filed more than ninety days after entry of the opinion and judgment of the Court of Appeals.

2. Whether the questions presented by Petitioner in this Court can be considered when they were not raised before or considered by either court below.

Statement of the Case

No detailed restatement of the facts as outlined by Petitioner will be made. This does not constitute endorsement of Petitioner's statement of facts, but rather reflects Respondents' belief that many of the facts stated, sometimes erroneously, by Petitioner are irrelevant to the instant petition. The facts are stated fully and accurately by the Sixth Circuit, 519 F.2d at 120-22.

This action was brought by Petitioner against Respondents exclusively under federal statutes, namely, the Sherman Act, 15 U.S.C. §§ 1-7, the Clayton Act, 15 U.S.C. §§ 12-27, and the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25. Diversity of citizenship did not exist between the Petitioner-Plaintiff and the Respondents-Defendants, and no state law claims were presented.

The trial of this action began on July 5, 1973 and concluded August 13, 1973. At the close of Petitioner's case, and without Respondents having offered any evidence, the District Court directed a verdict against Petitioner. The District Court and, on appeal, the Sixth Circuit, considered all evidence offered by Petitioner without regard to admissibility. 375 F. Supp. at 525; 519 F.2d at 123.

On August 22, 1973, Petitioner filed a motion for a new trial with the District Court. On March 18, 1974, the District Court issued its comprehensive opinion on the granting of the directed verdict and the denying of Petitioner's motion for a new trial.

Petitioner then appealed to the Court of Appeals for the Sixth Circuit which issued its opinion and judgment on June 2, 1975. That opinion concluded, 519 F.2d at 123:

> "A careful review of the record demonstrates that Overseas' antitrust issues were never clearly articulated and we have little to add to the extensive

discussion of the evidence made by the district judge in his memorandum opinion. Our examination of the evidence compels us to conclude, as did Judge Feikens, that plaintiff has totally failed in its proofs on the key elements of its antitrust claims:

> The overwhelming reality which emerges from the many weeks of testimony and the hundreds of exhibits in this case is the total failure of the plaintiff to even address many of the central questions raised by the law it has invoked, and its complete lack of concrete evidence as to those elements with which it has concerned itself. 375 F. Supp. at 544."

On June 17, 1975, Petitioner filed a "Petition for Rehearing In Banc" [sic] which was denied on July 10, 1975. The instant petition was filed in this Court on September 30, 1975.

ARGUMENT

I.

This Court lacks jurisdiction because the petition for certiorari was not timely filed.

Petitioner seeks review of the opinion and judgment entered by the United States Court of Appeals for the Sixth Circuit on June 2, 1975. The petition for certiorari was docketed in this Court on September 30, 1975. Ninety days after June 2, 1975, including weekend and holiday allowances, was September 2, 1975 .

Petitioner asserts (Pet. 2)[1] that the petition was timely under 28 U.S.C. § 2101(c) because it was filed less than

[1] All "Pet." references are to the instant petition for a writ of certiorari.

ninety days after the denial, on July 10, 1975, of its petition for rehearing in the Sixth Circuit. That denial reads as follows:

> "No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.
>
> Accordingly, the petition for rehearing is hereby denied." [Clerk's signature entered by order of the court.] Appendix I, 22a.

Such an order is clearly insufficient to begin anew[2] the running of the ninety day time period. As was said in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952):

> "If the court did no more by the second judgment than to restate what it had decided by the first one . . . the ninety days would start to run from the first judgment."

That proposition was thoroughly discussed and applied in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952), where the writ of certiorari was dismissed because the petition had not been timely filed.

[2] Even if the principle of *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 446 (1974) were to be applied, the petition for certiorari was not timely. The petition for rehearing, itself untimely under Rule 40(a), F.R.A.P., although dated June 14, 1975, was mailed, according to the proof of service, on June 16, 1975 and filed on June 17, 1975. It was denied on July 10, 1975 and thus was pending for 23 days, which is insufficient to make the petition timely.

It has long been established that the time requirements for a petition for a writ of certiorari to a court of appeals in a civil action are jurisdictional and that failure to comply with such time requirements precludes consideration of the petition by this Court.[3] *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 177-78 (1932); *Gotham Can Co.* v. *United States,* 281 U.S. 706 (1930); *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 418 (1923). Consequently, Respondents respectfully submit that the petition for certiorari filed by Petitioner on September 30, 1975 was not timely, may not be considered, and should be denied.

II.

The issues sought to be presented to this Court by Petitioner were not presented to or considered by either of the courts below and, being presented for the first time to this Court, do not give support for the granting of the petition.

Petitioner seeks to present as grounds for granting certiorari the alleged issues of whether the trial court applied the correct legal standard of the sufficiency of the evidence and whether the granting of a directed verdict denied a right of Petitioner to a jury trial. Both issues are

[3] A different rule may apply in other circumstances: (a) in criminal petitions for certiorari where the time requirements are established not by statute but by Supreme Court rule which occasionally has been waived, see, *e.g., Durham* v. *United States,* 401 U.S. 481 (1971); (b) in direct appeals or petitions for certiorari to trial courts after post-trial motions, see, *e.g., United States* v. *Adams,* 383 U.S. 39 (1966) and Rule 4, F.R.A.P.; and (c) in appeals or petitions for certiorari to the highest court of a state where the local rules provide that a motion for rehearing operates as an automatic stay, see, *e.g., Department of Banking* v. *Pink,* 317 U.S. 264 (1942). Rules 35(c) and 40, F.R.A.P., and Sixth Circuit Rule 3(b) make clear that the petition for rehearing did not suspend the finality of the June 2, 1975 opinion and judgment.

spurious and need not be considered on their merits, because they were not presented to either court below, were not considered by either court, and were not otherwise preserved for review by this Court. The briefs presented by Petitioner to the Sixth Circuit make no claim that the directed verdict was inconsistent with the Seventh Amendment. The petition for rehearing is likewise silent.

Although Petitioner did complain in the Sixth Circuit regarding the granting of a directed verdict, that argument was based entirely upon the trial court's justifiable inability to interpret the facts as supporting Petitioner's claims. Petitioner did not attack in the slightest the standard under which the trial court had found the evidence to be completely lacking. Petitioner asserted repeatedly throughout its brief, reply brief, and petition for rehearing filed in the Sixth Circuit, that the trial court misapplied the relevant standards by not in fact reviewing "the evidence in the light most favorable to the plaintiff," as it said it had or by ignoring certain evidence Petitioner thought significant. Nowhere did Petitioner allege, or even hint, to the Sixth Circuit that the trial court had relied upon the wrong standard.[4] Likewise, the opinion of the Sixth Circuit makes no mention of any such issue.

The late blooming invention of this supposed issue is demonstrated by the fact that Petitioner cited favorably below the two cases which it now claims to have been error for the trial court to consider, *Teti* v. *Firestone Tire & Rubber Co.,* 392 F.2d 294 (6th Cir. 1968), and *Domany* v. *Otis Elevator Co.,* 369 F.2d 604 (6th Cir. 1966), *cert. denied,* 387 U.S. 942 (1967) (*e.g.,* Petitioner's brief to Sixth

[4] Indeed, Respondents' Brief to the Sixth Circuit pointed out at page 12: "Plaintiff does not contend that the wrong legal standard was applied. . . ." Neither Petitioner's reply brief nor any of its papers seeking rehearing disputed this statement.

Circuit at 50). The attempt to raise issues, particularly constitutional issues,[5] in this Court for the first time has been consistently rejected. *E.g., Tacon* v. *Arizona,* 410 U.S. 351, 352 (1973); *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16 (1958). As stated in *Ramsey* v. *United Mine Workers of America,* 401 U.S. 302, 312 (1971):

> "We find no reference to this aspect of the case in the opinions in the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance."

As is evident from the fact that the issues raised in the instant petition were not argued to or considered by the courts below, this case does not involve, and never has involved, the questions of law posed in the petition for a writ of certiorari. Accordingly, the petition should be denied.

III.

There is no conflict among the circuits regarding the applicable law, and both the District Court and the Court of Appeals applied the proper law to the evidence.

This case involves only claims under federal statutes. Federal substantive and procedural law therefore governs all aspects of the case, including the standards to be applied in determining the sufficiency of the evidence to withstand a motion for a directed verdict.

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[5] Of course, no genuine constitutional issue has been presented by Petitioner. As stated in *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 455 (1959) (Frankfurter, dissenting):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict."

The general federal standards for the granting of directed verdicts have been clear, at least since *Brady* v. *Southern Ry.,* 320 U.S. 476 (1943). The standard enunciated in *Brady* at 479-80 is that:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Petitioner has stated (Pet. 7) that an alleged "lack of controlling guidance has left the various federal judicial circuits hopelessly split on usable tests" citing, *inter alia,* page 2330 of Professor Moore's treatise. In fact, the cited reference states:

> "The judicial authorities on the question of the proper standards for directing a verdict would seem to be pretty much in accord. The language utilized remains diverse and, occasionally, troublesome. Essentially what the cases reveal is not a difficulty of ascertaining a proper standard but a difficulty in applying the standard to the varying facts of the individual cases." (footnote omitted) 5A J. Moore, Federal Practice ¶ 50.02[1], at 2330 (2d ed. 1975).

Petitioner's other citations all involved diversity cases and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.,* neither of which is here involved. See, *e.g., Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 444-45 (1959); Cooper, *Directions for Directed Verdicts: A Com-*

pass for Federal Courts, 55 MINN. L. REV. 903, 973-76 (1971).

Petitioner's argument that the courts below applied an improper standard rests on two premises: first, that the District Court, by footnoting two cases [6] which Petitioner itself urged upon the courts below, applied an Ohio rather than a federal standard (Pet. 6, 8); and, second, that the Sixth Circuit "adopted" the District Court's opinion (Pet. 6, 16). In fact, neither premise is true.

The relevant portions of the District Court's opinion, 375 F. Supp. at 525, make clear that the court expressly adopted the federal standard of *Brady.* The citation of *Teti* was solely for the proposition that:

> "Of course it is a well-established rule that the court must view the evidence in the light most favorable to the party against whom the motion is made." 375 F. Supp. 499 at 525 n. 86.

Surely Petitioner cannot contend that it was error for the District Court to adopt this proposition, which clearly favored Petitioner and had long since been enunciated by this Court *inter alia* in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 (1962).

Similarly, *Domany* was cited by the District Court solely for the proposition that:

> "Thus, no rational inference favoring the plaintiff may be rejected because of conflicting evidence or inferences or questions as to a source's credibility." 375 F. Supp. at 525 n. 87.

[6] *Teti* v. *Firestone Tire & Rubber Co.,* 392 F.2d 294 (6th Cir. 1968); *Domany* v. *Otis Elevator Co.,* 369 F.2d 604 (6th Cir. 1966), *cert. denied,* 387 U.S. 942 (1967). Petitioner also claims (Pet. 8) that the District Court's citation of *Boeing Co.* v. *Shipman,* 411 F.2d 365 (5th Cir. 1969), *aff'g on en banc rehearing* 389 F.2d 507 (1968), evidences an application of an Ohio rather than a federal standard. *Boeing,* of course, applied the general federal standard of *Brady.*

Again, Petitioner surely cannot contend that it was error for the District Court to adopt this proposition, which is equally favorable to Petitioner and equally well established *inter alia* by *Continental.* The premise advanced by Petitioner that the District Court applied an Ohio rather than a federal standard is thus seen to be without foundation.

Plaintiff's second premise, that the Sixth Circuit "adopted" the opinion of the District Court, is similarly without foundation. It cannot be denied that the Sixth Circuit read and analyzed the District Court's opinion in depth and generally approved. But it is also clear that the Sixth Circuit made its own review of the law, the evidence and the application of the one to the other. As the Sixth Circuit concluded:

> "A careful review of the record demonstrates that Overseas' antitrust issues were never clearly articulated and we have little to add to the extensive discussion of the evidence made by the district judge in his memorandum opinion. Our examination of the evidence compels us to conclude, as did Judge Feikens, that plaintiff has totally failed in its proofs on the key elements of its antitrust claims."
>
> • • •
>
> "For purposes of ruling upon the motion for directed verdict, the district judge considered the proffered settlement evidence even though he was convinced it was inadmissible. We have also considered this evidence and conclude that its admission would not change the result here." 519 F.2d at 123.

Furthermore, the Sixth Circuit relied upon *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 452 F.2d 1095 (6th Cir. 1971), *cert. denied,* 406 U.S. 919 (1972), which in turn relied on *Brady* and *Continental,* as its source for a

statement of the general federal standards for directed verdicts. 519 F.2d at 122. The Sixth Circuit did not rely at all on either of the two cases which Petitioner claims tainted the District Court opinion.

Petitioner's argument, that the courts below applied an incorrect standard, is thus without merit. Both lower courts applied the general federal standards set forth in *Brady* and its progeny. Both courts concluded that Petitioner had "totally failed" in its proofs. The standard applied is not disputed among the various circuits or within the Sixth Circuit and was not even disputed by Petitioner in either court below. The petition, therefore, does not present any question of law for review, let alone a question of general importance. It merely asks this Court to use its time to review the evidence once again and to apply the proper standard to this evidence for a third time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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